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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No.

HONORABLE WALTER J. LA BUY,
Petitioner,

vs.

HOWES LEATHER COMPANY, INC. and
MONTGOMERY WARD & CO., INC.,
Respondents.

HONORABLE WALTER J. LA BUY,
Petitioner,

vs.

HOWES LEATHER COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, the Honorable Walter J. LaBuy, a Judge of the United States District Court for the Northern District of Illinois, Eastern Division, prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Seventh Circuit entered on October 13, 1955, directing the issuance of a writ of mandamus requiring petitioner to revoke two orders of reference entered by him.[1]

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[1] This petition concerns two applications for writs of mandamus filed in the Court below in companion cases. The Court below ordered the two cases consolidated, and they are accordingly before this Court as a consolidated case.

Opinion Below.

The order sought to be reviewed was entered in an original proceeding for *mandamus* filed in the Court of Appeals. The opinion of the Court majority, as well as that of the dissenting Judge, appears in the appendix to this petition and is also reported in 226 F. 2d 703.

Jurisdiction.

The order of the Court of Appeals was entered on October 13, 1955. A petition for rehearing and for rehearing *en banc* was denied on November 17, 1955. The jurisdiction of this Court is invoked pursuant to 28 USC 1254.

Questions Presented.

1. Whether the "All Writs Act" (28 USC 1651(a)) confers jurisdiction upon the Courts of Appeal to review by writ of mandamus a District Court's interlocutory and discretionary order of reference to a Master in Chancery.

2. Whether the issuance of a writ of mandamus is proper under the "All Writs Act" to revoke and annul an order of reference entered by a District Court acting within its jurisdiction merely because the majority of the Court of Appeals concluded the reference to be erroneous under Rule 53 (b) of the Federal Rules of Civil Procedure.

3. Whether the referral of a non-jury case to a Master for trial which the District Court found was necessitated by the unusual complexity of the factual and legal issues, by the length of time required to hear and determine such case, by the matters of account inherent in resolving the issues of liability, and by the extreme congestion of his trial calendar, was authorized by Rule 53 (b) of the Federal Rules of Civil Procedure.

Statute and Rule Involved.

The pertinent provision of the "All Writs Act" (28 USC 1651(a)) reads as follows:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Rule 53 (b) of the Federal Rules of Civil Procedure reads as follows:

> "(b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

STATEMENT OF THE CASE.

1.

The Nature of the Case.

The two consolidated cases made the subject matter of this petition find their genesis in two original petitions for writs of mandamus filed with the Court of Appeals for the Seventh Circuit. The moving parties in No. 11472 in the Court of Appeals (*Howes Leather Co., Inc.* and *Montgomery Ward & Co., Inc.* v. *The Hon. Walter J. LaBuy*) were two of multiple defendants in a case pending before the respondent District Judge (*Rohlfing, et al* v. *Cats Paw Rubber Co.*, No. 50 C 229, N. D. Ill., E. D.) which had been referred to a Master in Chancery for trial. The moving party in No. 11473 in the Court of Appeals (*Howes Leather Co., Inc.* v. *The Hon. Walter J. LaBuy*) was one of multiple defendants

in a companion case also pending before the same District Judge (*Shaffer, et al* v. *U. S. Rubber Co., et al,* No. 50 C 844, N. D. Ill., E. D.) which had been similarly referred to a Master for trial at the same time as its companion case. The two petitions for mandamus, without the assertion of any grounds to sustain them, asked the Court of Appeals to vacate the orders of reference previously entered in the two cases pending before the District Judge. The answers filed in response to the mandamus applications recited in factual detail the reasons impelling the Court to refer the cases to a Master for trial. The enumerated reasons were not challenged by the petitioners below, and the Court of Appeals similarly accepted them.

2.

The Referrals to the Master.

Both *Rohlfing, et al* v. *Cats Paw Rubber, et al,* and its companion case of *Shaffer, et al* v. *U. S. Rubber Co., et al,* were filed in 1950. There were originally eighty-seven plaintiffs (independent shoe repairmen) in *Rohlfing,* with twenty-five defendants (manufacturers and wholesalers of rubber goods, leather goods, and shoe polish, as well as department and chain store distributors). The *Shaffer* case was instituted by ten wholesalers of shoe repair articles against twenty defendant manufacturers and wholesalers of shoe repair materials and related items.

The complaints in both suits alleged conspiracies to violate Sections 1 and 2 of the Sherman Anti-Trust Act, and described the impact of the asserted conspiracies on the plaintiffs. A conspiracy to violate Section 3 of the Robinson-Patman Act was similarly advanced. The complaints as amended also contained separate counts (104

in *Rohlfing* and 20 in *Shaffer*) alleging individual violations of Section 2(a) of the Robinson-Patman Act and asserted damages to each of the plaintiffs in the two suits.

During the pendency of the suits a prolix series of motions were considered by the Court, and lengthy discovery proceedings were instituted. On February 23, 1955, both cases were called before the District Court on the plaintiffs' motion to reset them for trial to May, 1955 to permit the taking of further depositions. At that time the Court advised the parties of his congested calendar, suggested the possibility of referring the cases to a Master to expedite their trial, and advised counsel to appear in his chambers the following morning. At that time he outlined the reasons which he felt necessitated the referrals to a Master in Chancery, and on that day entered the orders of reference. The Master set both cases for hearings on May 2, 1955 to permit the plaintiffs to finish the taking of certain depositions. Just before the hearings before the Master were to commence, an oral motion was made to revoke the orders of reference. After consideration by the Court, this oral motion was denied. The petitions for a writ of mandamus were filed shortly thereafter.

3.

Reasons for the Referral.

The answers filed by the Trial Judge in response to the petitions for a writ of mandamus succinctly set forth the facts and reasons which impelled him to order the referrals. The considerations moving the Court to order the referrals were not challenged by the Court of Appeals, and may be summarized as follows:

1. The cases are complicated and complex, involving multiple plaintiffs and defendants, and place in issue difficult questions of law and fact concerning claims of violations of Sections 1 and 2 of the Sherman Act, and Sections 2 and 3 of the Robinson-Patman Act;

2. The cases also will require detailed accounting analysis, including the examination of a very large number of transactions;

3. The insistent demands of the parties for an early trial date on the completion of pre-trial discovery;

4. The congested nature of the Court's calendar, which foreclosed the demands of the parties for an expeditious trial before the Court;

5. The lengthy and protracted period of time necessary for the actual trial of the cases; and

6. The time necessary to sift and analyze the evidence, and prepare an opinion in the cases.

As stated in the District Judge's answer, it appeared to him that all of the considerations together amounted to exceptional and unusual circumstances within the meaning of Rule 53 (b) of the Federal Rules of Civil Procedure, justifying and authorizing the referrals.

4.

The Decision of the Court of Appeals.

The majority of the Court of Appeals (per Judge Lindley) first found jurisdiction and power under the All Writs Act to entertain the petitions for a writ of mandamus. The opinion stated its disagreement with a prior and directly conflicting decision of the First Circuit in the case of *In re Narragansett Pier Amusement Corp.*,

224 F. 2d 231 (CA 1, 1955) *cert. den.*, 76 S. Ct. 103. The Court, although giving full weight and credence to the reasons impelling the Trial Judge to order the referrals, determined that these reasons did not meet the requirements of Rule 53 (b) of the Federal Rules, and concluded that the Trial Court's order was thus "erroneous" and constituted an "abuse of discretion". The majority relied primarily on a *per curiam* decision by this Court in *McCullough* v. *Cosgrave*, 309 U.S. 634 (1940), in holding the references to have been erroneous.

Judge Major, in dissenting, agreed that the Court had power to act, but in the exercise of its sound discretion should not grant the writs. He viewed the controlling decisions of this Court as precluding the issuance of a writ of mandamus to correct in advance of final decision, an interlocutory order of a District Court thought to be erroneous by the Court of Appeals. On the merits, he would have sustained the orders of reference. He disagreed with the majority's interpretation of the *per curiam* decision by this Court in *McCullough* and observed that the Supreme Court "will sooner or later be called upon to repudiate" what he considered to be the misinterpretation placed on that case. He concluded by stating that the effect of the majority's opinion is to judicially repeal and nullify Rule 53 (b), and that "If reference is to be outlawed it should be by legislation or Supreme Court rule rather than by decision of this Court."

REASONS FOR GRANTING THE WRIT.

I.

The Holding of the Court of Appeals That the All Writs Act Confers Power upon It to Review by Writ of Mandamus a District Court's Interlocutory and Discretionary Order of Reference Is in Direct Conflict with a Prior Decision of the Court of Appeals for the First Circuit.

The Court below determined that it had authority under the All Writs Act to entertain a petition for writ of mandamus to revoke the order of reference entered by the Trial Court. In so holding, the Court below reached a decision directly in conflict with the prior opinion of the Court of Appeals for the First Circuit in the case of *In re Narragansett Pier Amusement Co.*, 224 F. 2d 231 (CA 1, 1955), cert. den., 76 S. Ct. 103.

In *Narragansett,* a petition for leave to file a writ of mandamus with the First Circuit was requested. The petitioners there sought to revoke orders of reference entered by the Trial Court in a series of anti-trust cases pending before that Court. The First Circuit refused leave to file, asserting that this was not the kind or type of case in which its jurisdiction could be invoked under the All Writs Act. The majority of the Court of Appeals for the Seventh Circuit recognized this conflict when it said:

> ". . . To this extent and on this basis, we feel constrained to disagree with the decision in the Narragansett case. The basis for that decision is in the view that if the issue as to the propriety of the interlocutory order may eventually reach the appellate tribunal by appeal after final judgment on the merits, then jurisdiction is wanting to test its propriety by mandamus in advance of a trial and final decision."

II.

The Extreme Diversity of Views Expressed by the Courts of Appeal Construing the All Writs Act, Coupled with the Far Reaching Consequences of the Holding of the Court of Appeals in the Case at Bar, Call for Review by This Court to Define and Delineate the Extent of Power and Authority Granted to the Courts of Appeals by the All Writs Act.

A.

The Diversity of Views Expressed by the Courts of Appeal Interpreting and Applying the All Writs Act.

A review of the decisions by the Courts of Appeal construing and applying the All Writs Act discloses the widest range and diversity of opinion as to the scope of the power and authority conferred by that Act on the Courts of Appeal.

The First Circuit has refused to construe the "All Writs Act" as conferring a "roving commission" upon it to supervise interlocutory orders of District Courts in advance of final decision. It has thus consistently refused to intercede in any instance where the challenged interlocutory order would not impair its potential appellate jurisdiction.

It has construed the All Writs Act as affording it authority to review a transfer order under 28 USC 1404(a) transferring a cause to another Circuit, but not with authority to review a refusal to transfer. See *e.g., In re Josephson,* 218 F. 2d 174 (CA 1, 1954). It has by the same reasoning refused to intervene by way of a writ of mandamus where the Trial Judge refused to transfer a case to the non-jury calendar (*In re Chappell & Co.,* 201 F. 2d 343); where the Trial Court refused to grant a motion for a jury trial (*In re Previn,* 204 F. 2d 417); or where the lower Court had permitted the substitution of a

party plaintiff (*In re Sylvania Electric Products*, 220 F. 2d 423).

The Eighth Circuit has adhered to the construction of the All Writs Act followed by the First Circuit. See *e.g.*, *Carr* v. *Donohoe*, 201 F. 2d 426 (CA 8, 1953) (refusal to review order transferring case to another district within the same Circuit); *Hydraulic Press Manufacturing Co.* v. *Moore*, 185 F. 2d 800 (CA 8, 1950) (refusal to review order denying motion to quash return of service).

Decisions by other Circuits do not follow the consistent pattern pursued by the First and Eighth Circuits. The Third Circuit, in *Canister Co.* v. *Leahy*, 191 F. 2d 255, issued a writ of mandamus directing the Trial Court to grant a jury trial to the petitioner. This assumption of power is in direct conflict with the position of the First Circuit (*In re Previn*, 204 F. 2d 417) and also is in conflict with the decision by the Eighth Circuit in *Petsel* v. *Riley*, 192 F. 2d (CA 8, 1951). Although the Third Circuit granted mandamus in *Canister Co.* v. *Leahy*, *supra*, it has denied a petition for such relief in the attempted review of a Trial Court's refusal to dismiss a complaint (*American Airlines* v. *Forman*, 204 F. 2d 230), and also where a Trial Court order to produce documents was challenged (*Pennsylvania R.R. Co.* v. *Kirkpatrick*, 203 F. 2d 149). In the latter two cases the Third Circuit used language and reasoning closely paralleling the reasons advanced by the First and Eighth Circuits in support of their construction of the All Writs Act.

The Second Circuit first refused to entertain writs of mandamus in transfer cases under 28 USC 1404(a). In *Magnetic Engineering Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866 (CA 2, 1950), Judge Learned Hand reasoned that the All Writs Act did not authorize a review where the transfer was

to another Federal District Court, but came into play only where there was a remand from a Federal Court to a State Court which threatened to terminate all federal jurisdiction. However, in *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (CA 2, 1950), where the refusal of the District Court to grant a transfer to another Circuit was in issue, the Court held it had jurisdiction to review this refusal under the All Writs Act. The trilogy became complete in the recent case of *Tores* v. *Walsh*, 221 F. 2d 319 (CA 2, 1955), in which the Court refused to issue a writ of mandamus where a transfer had been granted. The apparent conclusion to be drawn from these cases is that the Second Circuit will review by mandamus where the District Court refuses to enter a transfer, but will normally not entertain a petition for mandamus where a transfer order has been granted.

The Fifth Circuit has refused to entertain a writ to revoke a transfer order under 28 USC 1404(a). *Ex Parte Pfizer & Co.*, 225 F. 2d 720 (CA 5, 1955). The Court noted the diversity of opinion as to the proper application of the All Writs Act, and adopted a middle of the road approach, finding that the Trial Court had considered all "necessary facts and factors", and that there was no "clear abuse of discretion" shown.

The Ninth Circuit finds authority in the All Writs Act to review an order transferring a case within the Circuit but from one district to another. *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (CA 9, 1950). This holding is in direct conflict with the refusal of the Eighth Circuit to entertain a writ to review a transfer within the Circuit. *Carr* v. *Donohoe*, 201 F. 2d 426 (CA 8, 1953).

The Seventh Circuit, as is reflected in the case at bar, interprets the All Writs Act as giving it the widest latitude

in reviewing otherwise unappealable interlocutory orders entered by a District Judge. This Circuit has adhered to the view that the All Writs Act confers power upon it to act whenever it is shown that a Trial Court has abused its discretion or arrived at what the Court believes to be an erroneous decision. See *e.g., Chicago Rock Island R. Co.* v. *Igoe,* 220 F. 2d 299 (CA 7, 1955); *Goldberg* v. *Hoffman,* 226 F. 2d 680, 682 (CA 7, 1955).

The diversity of opinion expressed by the Courts of Appeal interpreting and applying the All Writs Act calls for the exercise by this Court of its supervisory powers to settle the conflicts that have arisen and which have multiplied.[2] The conflict in principle between the decision of the Seventh Circuit in the instant case and the decisions of the First and Eighth Circuits are compellingly clear. A granting of this petition will afford the Court the opportunity to dispel the conflict of views between the circuits as to the content and limits of jurisdiction conferred by the All Writs Act.

B.

The Court Below Has Decided a Federal Question Which Conflicts in Principle with Applicable Decisions of This Court.

Congress has stated that piece-meal review shall be avoided even though this necessarily may occasion some unavoidable delays and expense to the litigants involved (28 USC 1291, 1292). The decision of the Court of Appeals in the instant case clearly frustrates this legislative policy by judicially amending the All Writs Act so as to confer authority on Courts of Appeal to review any interlocutory orders which they may consider erroneous.

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[2] See note, 52 Michigan L. Rev. 1065, 1066 (1954) where the author comments as follows: "Judicial interpretation of the phrase 'in aid of their respective jurisdiction' has been so inconsistent that the cases would seem to be irreconcilable".

This holding of the Court of Appeals conflicts in principle with prior decisions of this Court that the traditional office of a writ of mandamus cannot be enlarged to control the decisions of trial courts, but rather should be employed "in its traditional function of confining a Court to its prescribed jurisdiction". *Bankers Life and Casualty Co.* v. *Holland,* 346 US 379 (1953). The conflict in principle extends not only to the *Bankers Life* case, but also to the prior decision of this Court in *Roche* v. *Evaporated Milk Association,* 319 US 341 (1943).

In the foregoing cases this Court has carefully reiterated the rule that extraordinary writs will not be entertained merely to review an interlocutory order entered by a lower Court where that Court had jurisdiction to hear and decide the issue presented for determination. As this Court stated in *Bankers Life and Casualty Co.* v. *Holland,* 346 US 379, 382-3 (1953):

> "If we apply the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act."

The philosophy underlying the decisions by this Court is reflected and applied in the decisions of the First and Eighth Circuits heretofore reviewed (Pet. pp. 9 to 12, *supra*). The dissenting Judge in the case at bar was of a similar view and expressed himself as follows:

> "The majority opinion asserts that respondent in entering the order of reference abused his discretion. No reason is assigned, however, for such holding other than that respondent made an erroneous ruling. But that is not sufficient, as is shown by statements from *Roche* and *Bankers Life, supra,* . . . In my opinion, there was no abuse of discretion by respondent, but the issuance of the writ will constitute an abuse of discretion by this Court. The shoe is to be placed on the wrong foot."

The decision of the Court of Appeals thus conflicts in principle with prior and controlling decisions of this Court and conflicts as well with decisions of the First and Eighth Circuits. It is respectfully submitted that the Court of Appeals has erroneously decided questions of critical importance to the federal courts, amply meriting review by this Court in the exercise of its supervisory powers over the federal courts.

III.

In Commanding the District Court to Vacate the Order of Reference, the Court of Appeals in Effect Nullified Rule 53(b) of the Federal Rules of Civil Procedure, Which Authorizes References Where Some "Exceptional Condition" Requires it, and Thereby Decided an Important Question of Federal Law Which Should be Reviewed by This Court.

The effect of the decision of the majority of the Court of Appeals is virtually to nullify Rule 53(b), and outlaw all references in non-jury cases, except for "* * * matters of account * * *." While recognizing that *jury* cases may be referred "* * * when the issues are complicated * * *," the Court below held that this was never a sufficient reason for referring a non-jury case. This holding is plainly contrary to the historic development of references in chancery, and is based on the incomprehensible conclusion that under Rule 53(b), the right to refer a non-jury case is actually narrower than the right to refer a jury case.

Furthermore, the Court below has wholly usurped the discretion conferred by Rule 53(b) on the District Judges to determine whether "exceptional conditions" necessitate a reference. The purpose and effect of the decision is to foreclose all references in non-jury cases except for "matters of account * * *," or where all of the parties agree to the reference. Whatever are "* * * exceptional

conditions * * *" justifying a reference, we are confident that unanimous agreement of the parties was never intended by the rule makers to be an absolute essential.

The Court of Appeals reached this result because of its own interpretation of this Court's short *per curiam* opinion in the case of *McCullough* v. *Cosgrave,* 309 U. S. 634 (1940). This Court did not explain its action in awarding the writ of mandamus in the *McCullough* case, except to refer to the earlier case of *Los Angeles Brush Corp.* v. *James,* 272 U. S. 70 (1926). Considering the actual record in the *McCullough* case and the opinion in the earlier case referred to, this Court must have determined only that it was a flagrant violation of the rule for a trial court to decide in advance that all cases of a certain class (*i.e.,* as all patent cases) sould be referred to a master.

Nothing of that sort is involved in the two references now before the Court. These cases were referred because of their own peculiarities; indeed this record shows that the Petitioner, Judge La Buy, over the last six years, has referred only nine cases to any master in chancery. The trial court, in the case at bar, entered the orders of reference only after a careful consideration of the various factors underlying his decision. He made, in substance, the judicial determination required of him by Rule 53(b) in deciding that exceptional circumstances sustained and necessitated the references. Certainly where, as here, the cases are unusually complicated because of the great number of counts, parties and theories of recovery; where the bulk of the evidence will consist of numberless accounting records of past sales which must be tediously received and examined to determine whether liability for price discrimination exists; where the cases will take months to try; and where the trial Court's calendar is abnormally

congested (largely because petitioner recently spent nearly one entire court year trying and deciding *United States* v. *DuPont*, Ans. par. 16), the trial judge should not be found to have abused the discretion conferred upon him by the Rule, in making the reference. In fact, such cases may well constitute "matters of account" embraced by Rule 53(b).

The majority below construed *McCullough* as standing for the proposition that a congestion of a trial calendar and complexity of the case is never enough to justify referral to a Master in Chancery. The dissenting Judge construed this opinion as holding that District Judges could not by rule or agreement refer all of a certain class of cases (in *McCullough* all patent infringement suits) to masters in chancery for trial, for such would represent an abdication of judicial judgment and discretion required by the Rule. The dissenting Judge also pointed to the decision by this Court in *Roche* v. *Evaporated Milk Association*, 319 US 21, 31 (1943), as substantiating his construction of the *McCullough* case. ("Hence there are in this case no special circumstances which would justify the issuance of the writ such as a *persistent disregard of the Rules of Civil Procedure*, . . . found in *McCullough* v. *Cosgrave*, 309 US 634, . . .") (Emphasis supplied).

The diversity of opinion as to the proper meaning and interpretation of the *per curiam* decision by this Court in *McCullough* v. *Cosgrave* is found in the commentaries on the case (See *e.g.*, 3 Federal Rules Service 496-7; Stern and Gressman "Supreme Court Practice", 263-264), as well as in the few decisions construing and applying Rule 53 (b). See *e.g.*, *United States* v. *Kirkpatrick*, 186 F. 2d 393 (CA 3, 1950); *Seib Hatcheries* v. *Lindley*, 13 FRD 113 (WD Ark, 1952).

Since the courts, as was aptly stated by Mr. Justice Brandeis in *Ex Parte Peterson*, 253 U. S. 300, 312-13 (1920) (in sustaining a reference to a master in a jury case) have "* * * inherent power to provide themselves with appropriate instruments required for the performance of their duties," this Court should now give an appropriate and authoritative construction to Rule 53(b) for the guidance of the lower courts—a construction broad enough to permit the trial courts to get their work done. It should not be a nullifying interpretation. Furthermore, the conflicting interpretations placed on the *per curiam* decision by this Court in *McCullough* v. *Cosgrave* has resulted in confusion as to the proper interpretation of Rule 53(b), as is vividly illustrated by the majority and dissenting opinions in the cases at bar.

It is therefore respectfully submitted that the importance of a definitive interpretation of Rule 53(b) as a guide to the Federal District and Circuit Courts falls well within the standards heretofore enunciated by this Court in determining whether a case merits review through a writ of certiorari.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

THE HONORABLE WALTER J. LA BUY,
United States District Judge

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